

SOUTHERN ENVIRONMENTAL LAW CENTER

200 WEST FRANKLIN STREET, SUITE 330
CHAPEL HILL, NC 27516-2559

Telephone 919-967-1450
Facsimile 919-929-9421
selcnc@selcnc.org

Charlottesville, VA
Chapel Hill, NC
Atlanta, GA
Asheville, NC
Sewanee, TN

January 7, 2009

L. Nelson Roberts, Jr.
SC Department of Health and Environmental Control
Bureau of Air Quality
2600 Bull Street
Columbia, SC 29201

RE: Designation of South Carolina Nonattainment Areas Under the Revised Eight-Hour
Ozone Standard

Dear Mr. Roberts:

The Southern Environmental Law Center ("SELC") submits these comments in response to the SC DHEC Bureau of Air Quality's request for public input on potential South Carolina nonattainment designations under the revised eight-hour ozone standard. SELC, a non-profit, regional, environmental organization dedicated to the protection of natural resources in South Carolina and throughout the Southeast, is committed to ensuring that the nonattainment boundaries for the revised 8-hour standard are set in a manner that is consistent with the requirements and intent of the Clean Air Act ("CAA" or "the Act") to protect public health with an adequate margin of safety. See 42 U.S.C. 7409(a). For this reason, we strongly support EPA's presumptive boundaries as presented on SC DHEC's website. We further support the designation of any area that contributes to a violation in a nonattainment area, even if the contributing area is itself not in violation of the 8-hour standard.

This position is consistent with EPA's 2008 guidance document, "Area Designations for the 2008 Revised Ozone National Ambient Air Quality Standards," (December 4, 2008) [hereinafter "2008 Guidance"], which provides that a state may not deviate from these presumptions unless it has considered nine factors and demonstrated that boundaries smaller than those presumed by the guidance will not violate the letter or intent of the CAA. We are deeply concerned that DHEC has utilized "air quality stakeholder meetings" as a platform for putting forth a series of maps that depict nonattainment designations which radically diverge from EPA's presumptive boundaries. No explanation of the factors justifying the deviations accompanies the maps, and indeed, it seems unlikely that any of the factors listed by the 2008 Guidance could account for such a departure. The legal and policy reasons for this position are discussed below.

Introduction

Pursuant to the CAA, EPA is required to set National Ambient Air Quality Standards ("NAAQS") sufficient to protect the public health with an adequate margin of safety. 42 U.S.C. § 7409 (a) & (b). In 2007, EPA's Clean Air Scientific Advisory Committee unanimously recommended selection of an 8-hour average ozone standard within the range of 0.060 to 0.070 parts per million ("ppm") for the primary "human-health based" NAAQS. The Committee recommended an alternative secondary standard of cumulative form to meet the CAA's requirement to protect human welfare. EPA declined to follow the recommendations of its scientific advisory committee, however, and instead set both the primary and secondary NAAQS for ozone to .075 ppm measured over 8-hour intervals ("the 8-hour standard"). While this downward revision marked an improvement on the existing .08 ppm 8-hour standard, EPA's scientific advisory committee made clear in an April 7, 2008 letter that its members "do not endorse the new primary ozone standard as being sufficiently protective of public health."

Along with many areas of the country, South Carolina has a serious problem with ozone pollution that is threatening the health and well being of its citizens and damaging its environment. According to information from DHEC, some 206,000 adults and 91,000 children suffer from the debilitating effects of asthma in South Carolina. Furthermore, in the recently released American Lung Association 2007 State of the Air Report,¹ South Carolina received failing air quality grades for Richland county, and a "D" in Spartanburg County. According to the best scientific knowledge available, much of South Carolina's population is breathing air that is damaging to its health.

Nonattainment designations provide areas with important tools to help bring themselves into compliance with the federal health-based air quality standards. For stationary sources, these tools include additional pollution control technology requirements for existing and new sources of pollution and pollution offset requirements for new sources of pollution. For mobile sources, the primary source of ozone pollution in South Carolina's largest metro areas, a nonattainment designation brings with it the requirement of transportation conformity.

For the following reasons, we urge DHEC and Governor Sanford to concur with EPA's presumptive boundaries to define South Carolina's nonattainment areas for the eight-hour ozone standard. By doing so, you will greatly enhance the state's ability to fulfill its responsibility to address the serious problem of ozone pollution and implement the standards as intended by Congress.

I. The Clean Air Act Requires Nonattainment Designations to Include Areas Containing Violating Monitors, Plus Nearby Areas That Contribute to Violations of the Eight-Hour Standard.

Pursuant to § 107(d)(1)(A) of the CAA, governors are required to submit to EPA proposed designations of all areas of the state as attainment, nonattainment, or unclassifiable following the promulgation of new or revised NAAQS. Governors are required to designate as

¹ Available at <http://lungaction.org/reports/stateoftheair2007.html>

nonattainment “any area that does not meet (or that contributes to ambient air quality in a nearby area that does not meet) the national primary or secondary ambient air quality standard for the pollutant.” 42 U.S.C. § 7407(d)(1)(A)(i) (emphasis added). EPA may then “make such modifications as the Administrator deems necessary” in promulgating the final nonattainment boundary designations. *Id.* § 7407(d)(1)(B)(ii). In its report on the 1990 Amendments, the United States Senate highlighted Congress’ intent that nonattainment areas be defined broadly, noting that “[t]he bill explicitly provides that EPA may include within the boundary [of a nonattainment area] an area that may cause or contribute to nonattainment in another area, regardless of whether pollutant concentrations in the first area exceed the standard.” S. Rep. No. 228, 101st Cong., 2nd Sess. 15, reprinted in 1990 CAA Legislative History 8338, 8353.

Even prior to the 1990 Amendments, which made explicit the breadth of EPA’s powers to designate nonattainment areas, EPA designated and courts upheld broad nonattainment boundaries in order to fulfill the basic purposes of the Act. In Western Oil and Gas Ass’n v. United States Environmental Protection Agency, 767 F.2d 603 (9th Cir. 1985), for example, the Ninth Circuit rejected an industry challenge to the inclusion of counties without violating monitors in a designated nonattainment area. The EPA included the disputed counties because they contributed significantly to the monitored violations of the ozone and carbon monoxide standards in neighboring counties. In upholding EPA’s decision, the court agreed with the agency’s reasoning that a nonattainment area should be large enough to allow for the imposition of needed control measures on the sources that are contributing to the violation of an air quality standard. The court also agreed that the alternative – narrowly defined boundaries – risked over-control of sources within the nonattainment area and probable under-control of sources outside of the area. This, in turn, could result in an economically and technically unreasonable pollution control strategy.

Likewise, in State of Ohio v. Ruckelshaus, 776 F.2d 1333, 1340 (6th Cir. 1985), Ohio petitioned EPA for the redesignation of a portion of the Cleveland ozone nonattainment area to attainment because air quality monitors there did not show violations. In upholding EPA’s denial of the petition, the court reasoned:

It appears a permissible exercise of [its] authority for EPA to deny redesignation with respect to a component of a nonattainment area which produces a substantial portion of the area’s pollution even though the air within that component tests at an acceptable level. If it were otherwise, the fortuitous circumstance that pollutants and precursors emitted within a county are moved by prevailing winds to a neighboring county would deprive EPA of the tools Congress provided for attacking pollution in the area of which the county is logically a part.

776 F.2d at 1340. See also, United States Steel Corp. v. United States Environmental Protection Agency, 605 F.2d 283 (7th Cir. 1979), cert. denied, 444 U.S. 1035 (1980), (upholding EPA’s designation of a broad nonattainment area based on monitoring and modeling results showing air quality violations in the area).

II. South Carolina Should Follow EPA Guidance and Designate the Core Based Statistical Areas, or County in Non-CBS Areas, Containing Violating Monitors as the Boundaries of Nonattainment Areas.

Closely following the CAA's statutory requirements and legislative intent, EPA's 2008 guidance for implementation of the eight-hour ozone standard also calls for broadly drawn nonattainment boundaries:

Section 107(d)(1) of the CAA defines an area as nonattainment if it is violating the NAAQS or if it is contributing to a violation in a nearby area. Ground-level ozone and ozone precursor emissions are pervasive and readily transported. Therefore, EPA believes it is important to examine ozone-contributing emissions across a relatively broad geographic area. Accordingly, we recommend that the Core Based Statistical Area (CBSA) or Combined Statistical Area (which includes 2 or more adjacent CBSA's) associated with the violating monitor(s) serve as the starting point or "presumptive" boundary for evaluating the geographic boundaries of an ozone nonattainment area. CBSA is a collective term that refers to both metropolitan and micropolitan statistical areas, which are distinguished based on population size. Each CBSA consists of a county or counties containing at least one urban core plus adjacent counties that have a high degree of social and economic integration with the urban core as measured by commuting ties. EPA recommends starting with this presumption because the factors used to establish the CBSAs and CSAs are similar to the factors EPA plans to consider in determining whether a nearby area is contributing to the violation(s) of the standard. EPA used this same conceptual approach in the designations process for the 1997 ozone NAAQS. Where a violating monitor is not located in a CBSA or CSA, we recommend that the boundary of the county containing the monitor serve as the starting point for considering the extent of the nonattainment area.

2008 Guidance at 3 (emphasis added).

Thus, in order to "best ensure public health protection from the adverse effects of ozone pollution," EPA's guidance applies the following presumptions:

- Any CBSA with a violating monitor will be designated nonattainment in its entirety.
- Any non-CBSA county with a violating monitor will be designated nonattainment in its entirety.
- Any county contributing to a violation will be designated nonattainment in its entirety, even if the contributing area shows attainment.

EPA *may* allow a state to deviate from these presumptive boundaries if the state addresses each of nine factors identified in the guidance and demonstrates that "the resulting recommendation is consistent with § 107(d)(1) of the Act." *Id.* at 4.

To date, DHEC has provided no justification for deviating from EPA's presumptive use of full counties and CBSAs. The agency has, however, presented a number of maps depicting

significant deviations at public “air quality stakeholder meetings.” These maps, available in Microsoft PowerPoint format on DHEC’s website, appear to exclude the better part of the presumptively designated nonattainment areas. Without full knowledge of the factors driving these exclusions at the public comment stage, however, it is impossible for South Carolina’s citizens to evaluate whether DHEC’s departures from EPA’s guidance are in the interest of protecting public health. Reviewing these maps and the monitoring information provided by DHEC, several problems jump out at even the casual observer. Whereas EPA’s proposed boundaries regulate in broad strokes, ensuring to capture all potential sources of pollution that contribute to an area’s pollution problem, South Carolina’s “possible boundaries” take a piecemeal approach, assigning boundaries around existing urban areas, yet not extending them to entire CBSAs or counties.

Using CBSA boundaries to delineate nonattainment areas is not only consistent with EPA’s 2008 Guidance, but also promotes both air quality benefits and economic fairness. The general concept of a CBSA “is that of a core area containing a large population nucleus, together with adjacent communities having a high degree of economic and social integration with that core.”² Given the high degree of economic and social integration of communities within an CBSA, there is an equally high probability that pollution sources throughout the CBSA, including the cars of commuters traveling to urban centers, contribute to air quality violations within the CBSA. It is also likely that these areas will share recruiting for key industries. It would produce absurd air quality results, as well as an inequitable distribution of economic costs and benefits, if new industries were encouraged to locate immediately outside of a narrowly drawn boundary while the industries and individuals on the other side of the line were required to bear the costs of that outside industry’s pollution. This problem is significantly lessened with broader-drawn boundaries as the line is more likely to fall in rural areas that will truly stay rural, rather than in suburban or ex-urban areas where growth is continuing to expand.

Prime examples of the need to designate nonattainment areas broadly based on CBSAs for the sake of air quality and economic fairness, can be found in DHEC’s “possible boundaries” for both the Anderson-Greenville-Spartanburg CBSA and the Charlotte-Rock Hill CBSA. Under the scenario depicted in presentations by DHEC, Greenville’s nonattainment designation would jut out along a narrow finger of land along the Pickens County border to the Clemson air monitoring site. The area immediately surrounding the campus of Clemson University would become a nonattainment area unto itself. Such a boundary would irrationally burden a small segment of Pickens County residents along US Highway 123, while doing nothing to bring ozone levels within legal limits. The “possible boundary” would exempt the entirety of Anderson County from the area, despite the significant ozone contribution of commuters along I-85 to the area. It also omits the entirety of Oconee County, the border of which is within a short walk of the Clemson air monitoring site.

The partial exclusion of York County from the Charlotte CBSA gives similar cause for concern. Particularly in these highly populated and fast growing areas, DHEC should not take the risk of further encouraging sprawling land use patterns, but should instead designate the

² See U.S. Bureau of the Census, About Metropolitan and Micropolitan Statistical Areas available at <http://www.census.gov/population/www/metroareas/aboutmetro.html>.

entire CBSA as recommended by EPA. The “possible boundaries” depicted in DHEC presentations would encourage the citing of new stationary sources and highway expansion in the “attainment” designated area of the CBSA, while unfairly and inefficiently burdening residents within pockets of land narrowly drawn around air monitoring sites.

As DHEC is aware, VMT growth has far outstripped population growth in South Carolina and urban sprawl is an ever-increasing problem. These problems, however, can either be addressed or exacerbated through the nonattainment boundary defining process. While broader inclusiveness will allow areas to best reap the benefits of coordinated land-use planning through the federal tool of transportation conformity, narrower boundaries could encourage expansion outside the boundaries in order to avoid the nonattainment consequences. Nonattainment designations and transportation conformity should be seen as an opportunity to cure this problem rather than simply shift it farther into outlying areas.

To the degree that DHEC wishes to depart from EPA's guidance, any recommendation to exclude parts of a CBSA or county containing a violating monitor from the designated nonattainment area should be supported by air quality modeling that demonstrates that sources within the excluded portions of the CBSA or county do not contribute to ozone formation in the nonattainment area under any weather conditions. It should also discuss with particularity, on a county-by-county basis, all nine factors in EPA's guidance. Only with complete information on these matters will EPA and the citizens of South Carolina be able to evaluate whether DHEC's proposed nonattainment designations will be effective in carrying out the public health purposes of the Clean Air Act. SELC reserves the right to comment further on South Carolina's proposed boundaries once DHEC publicly issues a detailed analysis of the applicability of EPA's nine factors.

III. South Carolina Must Also Include In Its Proposal Areas That Contribute to Ambient Air Quality In a Nearby Area That Does Not Meet The 8-Hour Standard

Finally, the materials made available by DHEC provide no information about sources outside of counties with nonattaining monitors that may contribute to nonattainment areas, and hence, by the terms of the statute, must be included in the nonattainment boundaries. Such information must be made available to EPA and be considered during the nonattainment boundary recommendation process.

As stated previously, under 42 U.S.C. § 7407(d)(1)(A) and EPA guidance, if DHEC has reason to believe that sources contribute to ozone violations in nearby areas, it must draw the nonattainment boundaries to capture these sources. It is inadequate for DHEC simply to promise that appropriate control strategies and regulations will be developed for such sources in the event that they are excluded from the nonattainment area. The purpose of giving EPA the authority to broadly define nonattainment areas is to better equip the state and EPA with tools necessary to clean up sources contributing to violations of air quality standards. As the Sixth Circuit noted in rejecting a scheme identical to that now being contemplated by DHEC, “were [it] otherwise, the fortuitous circumstance that pollutants and precursors emitted within a county are moved by prevailing winds to a neighboring county would deprive EPA of the tools Congress provided for

attacking pollution in the area of which the county is logically a part.” State of Ohio v. Ruckelshaus, 776 F.2d at 1340.

Conclusion

It is imperative that South Carolina act decisively to protect our health and natural resources from ozone pollution. It can do so by recommending an appropriate designation of nonattainment areas for the eight-hour ozone standard. For all of the foregoing reasons, we urge DHEC and Governor Sanford to adopt EPA’s presumptive boundaries in designating these areas. We thank you for the opportunity to submit these comments.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Thomas M. Gremillion', written over a horizontal line.

Thomas M. Gremillion

J. David Farren

CC: Mark Sanford, Governor
Myra Reece, Chief of Bureau of Air Quality
Brian Barnes, Bureau of Air Quality
Beverly Banister, EPA Region 4
Carol Kemker, EPA Region 4
Richard Schutt, EPA Region 4